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MICHAEL RODAK, JR.,

No. 74-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

CHUGACH NATIVE ASSOCIATION AND
CHUGACH NATIVES, INC., *Petitioners*

v.

CENTRAL COUNCIL OF THE TLINGIT & HAIDA INDIANS
OF ALASKA AND SEALASKA CORPORATION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

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A. Acknowledging that if arbitration is directed and Sealaska prevails therein, "the entitlements of the several Regional Corporations will have to be recomputed,"[1] under § 12(c) of the Act (see Pet. 17-18), respondents nevertheless contend that an increase of Sealaska's bounda-

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[1] Memorandum opposing certiorari (hereafter Mem.), p. 4, n. 1, cont. The petition for certiorari will be referred to herein as "Pet.".

ries "*by as many as 500,000 acres* would change the overall results of applying the formula hardly at all" (Mem. 4, n. 1 emphasis added).[2] This contention, like respondents' assertion that sufficient land has already been withdrawn to satisfy any additional entitlements of other regions, is unsupported by anything in the record. The District Court concluded that ordering arbitration in this case "would impede the Secretary's ability to implement Sections 5, 11, 17 and 19 of the Act according to the timetable set forth in the Act." (Pet. 3(a)); the Court of Appeals did not express disagreement with this conclusion. Indeed, respondents have not previously contested the Secretary of Interior's assessment that a revision of Sealaska's boundaries would uproot "every major administrative decision previously made." (R. 169, quoted at Pet. 18).

Likewise unwarranted are respondents' speculations that it is "unlikely" that any other regional corporation will wish to change its present boundaries and that if any should do so, its claim "will almost certainly be held barred by laches" (Mem. 5). Given the inherent imprecision of that doctrine (Pet. 15), the decision below makes it impossible now or in the foreseeable future to declare "with certainty" (§ 2(b) of the Act) that the regional boundaries have been "finally determined" (Mem. 5).[3] Yet, if the

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[2] Since Sealaska has hitherto claimed that its boundary should be extended west at least to the Copper River, a potential addition of over 3,500,000 acres, this statement, unless intended to mislead the Court (which we are confident it is not) must be taken as a representation that only 500,000 acres will be in dispute if the order to arbitrate escapes review.

[3] For example, regional corporations that were negotiating their boundaries with neighbors and withheld the demand to arbitrate because they assumed the Secretary's time limit was binding, could not be charged with lack of diligence (Pet. 8a quoting *Costello* v. *United States*, 365 U.S. 265, 282) if they assert such a demand when that assumption is finally held to have been unwarranted.

intent of Congress had been respected, § 7(a) would long ago have become a "dead letter" (*id.*) since the establishment of the regional boundaries is the essential first step in determining the region's entitlement to land and in the withdrawal and selection process (Pet. 15-17).

B. While "Section 7(a) of the Act granted the Native peoples of Alaska, through their regional associations and corporations, the right to arbitrate regional boundary disputes between themselves" (Mem. 3), it does not also grant them the right to determine the *timing* of arbitration. For the right to arbitrate is ancillary to and in aid of the Secretary's responsibility under § 7(a) to draw regional boundaries. Congress having directed him to do so within one year, in furtherance of its desire that the grant be distributed "rapidly, with certainty," it would have been utterly self-defeating to deny the Secretary the power to impose a deadline for the completion of arbitration which could upset the boundaries he established.

C. Emotional catchwords like "paternalism" (Mem. 5) ought not obscure the Secretary's central administrative role. And when this role is properly appreciated, three propositions of general importance necessarily follow concerning the proper relationship of the courts and administrative officials:

(1) The Secretary's broad responsibilities under the Act bring into play the precedents which require the courts to give a generous construction to his authority to accomplish the Congressional purposes, rather than to imply from the failure to spell out such authority that it has been withheld (Pet. 19-21).

(2) The Secretary's construction of § 7(a) is entitled to great respect under the *Norwegian Nitrogen Products* principle (Pet 21-22); and

(3) The Secretary's policy in establishing a deadline should not be judicially disapproved in a proceeding in

which he is not a party (Pet. 23-26). Despite the respondents' artful joinder of the two concepts in a single sentence, the Secretary's lack of standing in arbitration proceedings says nothing about propriety of joining him as a participant in this suit to compel arbitration, which is governed by Rule 19 F.R.Civ.P. Respondents cannot and do not deny that the decision of the court below conflicts with other Court of Appeals holdings regarding the joinder of a federal agency in a suit which indirectly attacks "the integrity of its administrative decision", See *Boles* (Pet. 23-24) 468 F.2d 476, 479, and more broadly with Justice Harlan's lucid analysis of that Rule in *Provident* (Pet. 25).[4]

Respectfully submitted,

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[4] Since respondents seek to convey the impression that this case will soon be moot because "pursuant to the district court's order of December 10, 1974, the parties hereto are presently proceeding with arbitration" (Mem. 5; *see also, id.* 4), we note that while each side has picked its arbitrator, the arbitrators have not yet met, as § 7(a) contemplates, to select a neutral.